THE LAWREVIEWS

The Dominance and Monopolies Review: Austria

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Introduction

The Austrian legal regime regulating market dominance is set out in Part II (Sections 4 to 6) of the Austrian Cartel Act (KartG), stipulating the prohibition on abusing a (single or collective) dominant position and retaliation measures imposed by dominant companies against companies initiating cartel court proceedings or lodging a complaint with the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (together, the Official Parties). Further, abusive behaviour of companies having relative market power in relation to their suppliers or customers is also prohibited.

In addition to the general provision prohibiting abuse of a dominant position, Section 5 of the KartG also contains examples of abusive behaviour: the examples in Section 5, Paragraph 1, Nos. 2 to 4 of the KartG are based on Article 102, Letters b to d of the Treaty on the Functioning of the European Union (TFEU). Section 5, Paragraph 1, No. 1 of the KartG does not follow the exact wording of Article 102, Letter a of the TFEU, but prohibits requesting prices or other conditions that differ from those prices or conditions that would exist under a functioning competitive environment.

Another distinct characteristic of Austrian antitrust law is the specific (rebuttable) statutory presumptions of dominance based on market shares (Section 4 of the KartG), which are stricter than the market dominance presumptions developed by the EU institutions in the case law of Article 102 of the TFEU.

In addition, even for companies not holding a dominant position, the Austrian Act on Improvement of Local Supply and Competitive Conditions (Fair Competition Act) contains specific provisions governing certain types of unilateral behaviour such as dissimilar trading terms.

In Austria, there exists no formal guidance on the application of the statutory rules on abuse of a dominant position in general. However, guidance can be derived from the case law of the cartel court (Higher Regional Court of Vienna (OLG) and the Supreme Court acting as a higher and appellate cartel court (OGH)), as well as the European Commission and the EU courts (as Section 5 of the KartG in substance largely corresponds to Article 102 of the TFEU). Moreover, the FCA has published sector-specific notices on market dominance in the fields of funeral services[2] and motor vehicle distribution,[3] and on media cooperation between concert promoters and radio stations,[4] as well as a notice on unfair trading practices in the supply chain.[5]

No special rules apply to public sector or state-owned enterprises. Thus, Austrian antitrust law also applies to companies entirely or partially, directly or indirectly, owned by the state if these companies carry out an economic activity (functional approach).[6] However, special rules apply to certain regulated industries, such as electricity, gas, telecommunications, post and railway, which are under the jurisdiction of industry-specific national regulatory authorities (e.g., the Telekom-Control Kommission (TKK), the Regulatory Authority for Broadcasting and Telecommunications (RTR), E-Control and Schienen-Control GmbH). When applying the provisions of the KartG, the FCA shall ensure consistency with the decisions of regulators. Further, the FCA can exchange information with regulators in accordance with the principles of data protection. In this regard, in autumn 2019, the RTR's telecommunications and postal services unit and the FCA announced that they would set up a joint task force to work more closely together on competition issues in the area of digital platforms.[7] As a result, the RTR, in cooperation with the FCA, published a method paper on monitoring digital platforms on 19 May 2020,[8] as well as a report titled 'Interpersonal communications services with a focus on instant messaging' on 18 December 2020.[9] Further, the FCA has announced that it will support the planned analysis of the mobile communications market by the TKK in the light of the expiry of the wholesale commitments from the *Hutchison 3G/Orange* merger at the end of 2022 and the complaints from various wholesale service providers in 2020 and

2021 in this regard.[10] Beforehand, the FCA and the TKK also held a consultation on mobile communications and competition on 24 March 2021.[11]

In the course of the amendment of the KartG in 2013, the legislator intended to enact specific rules for energy supply companies in a dominant position. However, the parliament's judicial committee in the review process rejected this proposal, as its legal implications were considered premature (apparently, the proposal faced heavy opposition from some Austrian federal states owning incumbent local electricity suppliers).[12]

Following the Austrian Cartel and Competition Law Amendment Act 2021 (KaWeRÄG 2021),[13] which entered into force on 10 September 2021, it is to be expected that dominant digital platforms will be examined more closely under Austrian competition law in the future (for an overview of the amendments, see in detail under Sections III.ii and VIII).

Year in review

Compared to the number of proceedings initiated by the FCA in previous years in the field of agreements and concerted practices restricting competition, public enforcement in the area of abuse of dominance has been very limited in recent years. This might also stem from the fact that in a number of recent cases the FCA has not been successful in arguing its case before the cartel courts; examples include the *Taxi App* case relating to exclusivity clauses,[14] and, more recently, the *Liquid Gas Tank* case relating to tying clauses.[15] In both of these cases, the OGH did not follow the FCA's arguments claiming an abuse of a dominant position.

However, in the past year, a number of alleged abuse of dominance decisions instituted by private claimants or regulators have been published:

A very recent case involves the online sale of digital vignettes from the webshop of Autobahnen- und Schnellstraßen-Finanzierungs-Aktiengesellschaft (Asfinag) by a German company, Registeranzeiger GmbH, to end customers located outside of Austria and only for vehicles with a non-Austrian licence plate. In contrast to the vignettes purchased by end consumers located in Austria directly from Asfinag or its distributors (who are obliged to distribute them without surcharge) – which are only valid after 18 days after purchase, taking into account the 14-day right of withdrawal of end customers for online transactions (plus postal service) under Austrian consumer protection rules – the vignettes sold by Registeranzeiger GmbH to non-Austrian end-customers are valid immediately and include a service surcharge of (depending on the product) €5 to €10.40. As a result, Asfinag blocked the customer account of Registeranzeiger GmbH, claiming that it had to deal with an 'enormous amount of work' incurred from complaints from direct Asfinag customers. The OGH has now confirmed an interim injunction issued by the OLG ordering Asfinag to open its webshop to Registeranzeiger GmbH for the purpose of enabling their new webshop offering (i.e., the online sale of immediately valid vignettes including a service surcharge, thus being a new service that had not been offered until now).[16] According to the OGH, preventing Registeranzeiger GmbH from immediately offering a new product to end customers, for which there may be a need among consumers particularly in times of pandemic, constitutes an abuse of dominance within the meaning of Section 5 of the KartG and Article 102 TFEU.

One of the most prominent recent Austrian dominance cases concerns the ruling of the OGH against Peugeot Austria Gesellschaft mbH (Peugeot) confirming the abuse of its (relative) dominant position (regarding its dependent dealers) in relation to new car distribution and garage services.[17] The proceedings were initiated by Austrian car dealer Büchl GmbH (Büchl), claiming that Peugeot abused its (relative) dominant position by, inter alia, tying dealer compensation to certain sales requirements, subsidising vehicle prices at its own sales outlets, linking premium payments to customer satisfaction surveys (in relation to new car distribution) and setting warranty work and the provision of refunds for spare parts at below-cost hourly rates. The ruling of the OGH now obliges Peugeot to end this abuse of a dominant position within three months, with particular reference to Peugeot's relative market power in relation to car dealers, as Büchl is economically dependent on maintaining its contract with Peugeot.

In a recent case regarding the sale of a temozolomide drug used to treat brain tumours,[18] the FCA filed an application for a declaratory judgment with the OLG against the global pharmaceutical company Merck Sharp & Dohme GmbH for a possible abuse of a dominant position through predatory pricing. The FCA found that the alleged predatory strategy is expected to increase the costs for the healthcare system in the long term and to impact negatively on security of hospital supply in the affected market for temozolomide. In addition, the FCA took the view that such predatory strategy impedes market entries of generic drug manufacturers, as the hospitals concerned then have no incentive to switch to generic drugs containing the same agent. In March 2021, after the company offered commitments to resolve these concerns, Merck Sharp & Dohme GmbH and the FCA reached an agreement before the OLG ended proceedings.

On 25 January 2021, the OGH issued a decision on long-term contracts for the import of Russian natural gas into Austria, whereby only one of the buyers was granted an early termination right.[19] Following the decision of the OLG after initiation of proceedings by the regulator E-Control against the Russian natural gas producer Gazprom, the OGH decided that the duty of equal treatment applies only in relation to contractual partners being in the same position in relation to the dominant undertaking. Because the long-term demand coverage of two of the companies concerned was lower and a right to pass on the gas volumes had been agreed, these companies were not in the same position as the company that had been granted an early right of termination. The fact that Gazprom had allowed only one of the three companies to terminate the long-term contract earlier therefore did not constitute an abuse of market power on the grounds of Article 102, Letter c of the TFEU and Section 5, Paragraph 1, No. 3 of the KartG.

A recent case involved a congestion management system (i.e., measures that grid operators implement to avoid or eliminate bottlenecks in the electricity grid to ensure grid stability and security of electricity supply) introduced at the German–Austrian border in October 2018. In this regard, Austropapier (the association of the Austrian paper industry), Voestalpine, Verbund and the Austrian energy exchange EXAA jointly filed an application to the OLG against the German transmission system operator TenneT TSO GmbH (TenneT). The applicants essentially argued that TenneT was abusing its dominant position as its

congestion management system, which should have been located on the Austrian–German border, is located within Germany, leading to an anticompetitive distortion of the market. The OLG, however, rejected the application, stating that TenneT alone (without the other German transmission system operators (TSOs)) cannot be ordered to make changes single-handedly, and considered the TSOs' 'objection of state action' to be justified.[20]

In early 2019, the FCA initiated an investigation against Amazon Services Europe Sàrl (Amazon) concerning unfair trade practices imposed on Austrian retailers active on Amazon Marketplace, after having received a number of complaints via the Austrian Retail Association.[21] As a result, Amazon revised some of the terms and conditions of its business solutions agreements, thereby removing some of the competition concerns of the FCA. However, the FCA declared that it will continue to monitor individual aspects (such as communication and logistics) that remain subject to further investigations.[22] The detailed case report on the matter[23] particularly deals with the discriminatory clauses imposed on retailers by Amazon: inter alia, allowing the immediate termination or suspension of a retailer's account, the obligation to disclose purchase prices, the provision of incorrect delivery details by Amazon for retailer deliveries, unjustified deletion or loss of product rankings and choice of law and court clauses, which make it difficult for a retailer to take legal action.

Owing to the small number of cases related to abuse of a dominant position, the table below lists the most important fine decisions in abuse of dominance cases before the Austrian cartel courts in recent years. In this context, it can be observed that in most dominance cases that were initiated by private claimants, no (subsequent) requests for an imposition of fines were lodged by the Official Parties following a decision finding an abuse.

Year	Sector	Company	Conduct	Fine
2007	Financial services	Europay Austria Zahlungsverkehr GmbH	Discriminatory pricing, exclusionary practices	€7 million
2009	Telecommunication	Telekom Austria TA AG	Abuse of a dominant position (not specified)	€1.5 million
2011	Film distribution	Constantin Filmverleih	Refusal to supply	€150,000 and an obligation to provide copies of films to all requesting cinemas
2012	Rail freight transport	ÖBB-Personenverkehr AG	Alleged discriminatory prices depending on whether the main run was procured together with the pre-carriage and delivery	No infringement found by the cartel court

Market definition and market power

i Market definition

The assessment of whether a company enjoys a dominant position is closely linked to the definition of the relevant product and geographic market. Before the Austrian courts, the market definition is an issue of fact when it comes to examining the objective delimitation criteria and a legal question when it comes to choosing the methods to define a market.[24]

When defining the relevant product market, the FCA and cartel courts follow the demand-side substitution concept, and thus analyse the substitutability of the goods or services from the demand-side perspective.[25] However, in cases where the market position of a supplier or manufacturer is to be determined, it is also necessary to include the substitutability of the goods or services from the supply-side perspective (i.e., whether other suppliers or manufacturers are able and willing to adapt their product portfolio or production within a short time and without significant costs) when defining the relevant product market.

The small but significant and non-transitory increase in price test is often used when defining the relevant market. However, in accordance with the European Commission,[26] the OGH takes the view that in cases of abuse of dominance, this test should be dealt with carefully, as the prices of a company holding a dominant position might already be above market level, with a further small price increase causing the demand-side to switch to a (false) substitute that could result in a too-broad market definition.[27]

In accordance with EU law, the geographic market comprises the area in which the companies concerned compete, in which the conditions of competition are sufficiently homogeneous, and that can be distinguished from neighbouring areas because of appreciably different competitive conditions.[28] Factors for determining the relevant geographic market are thus the characteristics of the product (i.e., durability, limited transport capacity), the existence of market entry barriers or consumer preferences as well as significantly varying market shares of competitors in neighbouring areas. Thus, the geographic market is also defined through a substitutability test. In practice, in legal proceedings before the cartel court, questions concerning market definition are very often dealt with by court-appointed experts, with the cartel court frequently and to a large extent relying on the expert's opinion. Thus, challenging an expert's findings as regards the relevant markets in an appeal (which is limited to questions of law) can be quite difficult.

ii Dominance

Austrian antitrust rules include provisions on single and collective dominance as well as relative dominance (see below).

With respect to the determination of a dominant market position of an undertaking operating in a multi-sided digital market, a new procedure is introduced following the KaWeRÄG 2021: Sections 28a and 36 Paragraph 2a of the KartG now make it possible for the Official Parties and the regulators to lodge an application with the cartel court requesting it to declare that an undertaking operating in a multi-sided digital market holds a dominant position. Such a proceeding does not require an allegation of an abuse of a dominant market position. Therefore, once such a decision has been rendered, the existence of a dominant position will no longer have to be established in a subsequent proceeding alleging an abuse of dominance.

Single dominance

According to the definition in Section 4, Paragraph 1 of the KartG, a company has single dominance if it is not subject to any or only insignificant competition, or in comparison to all other competitors holds a superior market position. Section 4, Paragraph 1, Sentence 2 of the KartG further substantiates that a company's financial strength, its links to other companies, its access to the supply and sales markets as well as market barriers for other companies should all be taken into account when determining the existence of single dominance. The KaWeRÄG 2021 introduces additional (exemplary) market dominance criteria that can be taken into account when deciding whether an undertaking has a dominant position specifically addressing digital markets, such as the importance of intermediary services for the market access of other undertakings, access to competitively relevant data and the benefits derived from network effects.

In addition to the characteristics of the respective company, it is also necessary to consider the market structure, particularly the number of competitors and their respective market shares.

When calculating market shares, the activities of all companies belonging to the same group active on the relevant market have to be taken into account. As an Austrian company particularity, the turnover of any non-controlling participations of at least 25 per cent may also have to be taken into account when it comes to market share calculation.[29]

Overall, the respective market share of a company (including its group companies) is still considered the most important factor in determining market power in case law. The OGH has classified a company having a 95 per cent[30] and 65 per cent[31] market share as holding a dominant position. In cases of market shares below 60 per cent, particular consideration is given to the market position of the other competitors: that is, whether they have similar market shares, or whether one company is the only 'major' player, with its competitors playing just a minor role in the market. In this assessment, the authorities and courts also take into account how market shares have developed to date and what is to be expected in the near future.

In addition to the market share of a company and under the criteria set out in Section 4, Paragraph 1, Sentence 1 of the KartG, the authorities and courts also take into account possible technical leadership or commercial know-how, outstanding innovation capability, access to public funding or vertical integration of the company when determining single dominance.

In addition to the general clause of Section 4, Paragraph 1 of the KartG, Austrian antitrust law foresees (rebuttable) market dominance presumption thresholds in Section 4, Paragraph 2 of the KartG in the case of a company holding a market share of:

a. at least 30 per cent;
b. more than 5 per cent, with only two other competitors being active in the same market; or
c. more than 5 per cent, with the company belonging to the four biggest companies in the market, which together hold a combined market share of at least 80 per cent.

In these cases, the onus is on the company to prove that it does not have a market dominant position as stipulated in Section 4, Paragraph 1 of the KartG. To rebut the above presumptions of market dominance, companies generally base their arguments on the presence of strong competitors, low market entry barriers, a strong countervailing market side and overall significant competition in the market.

In practice, the threshold of a 30 per cent market share receives a great deal of attention, in particular in merger control proceedings, while the other two presumptions so far have not gained any major practical importance, especially since the entry into force of the new presumptions for collective dominance (Section 4, Paragraph 2a of the KartG).

Collective dominance

Section 4, Paragraph 1a of the KartG was incorporated into the Cartel Amendment Act 2012 and defines collective dominance under Austrian antitrust law. According to this provision, two or more companies hold a collective market dominant position if there is no significant competition between them, and they are not subject to any or only insignificant competition or together hold a superior market position in comparison to all other competitors.

When determining whether two or more companies collectively hold a dominant position, the same principles relevant for the assessment of single dominance are used (see above). However, so far, we are not aware of any published Austrian case law where collective dominance was established.

As for single dominance, a (rebuttable) presumption for collective market dominance exists if three or less companies hold a combined market share of at least 50 per cent, or five or less companies hold a combined market share of at least two-thirds.

In these cases, the onus is on these companies to prove that they do not hold a collectively dominant market position as stipulated in Section 4, Paragraph 1a in connection with Section 4, Paragraph 1 of the KartG. Thus, for a rebuttal of the presumption of collective dominance, companies have to either show that there is significant competition between them or that they do not collectively fulfil the dominance criteria set out in Section 4, Paragraph 1 of the KartG.

Relative dominance

A company is also considered dominant if it has a paramount market position relative to its customers or suppliers; in particular, such relative market dominance exists when customers or suppliers are dependent on continuing their business relationship with a company if they do not want to suffer severe economic disadvantages.

Relative market dominance exists if the respective business partner depends on a specific good or service (only) offered by a company taking into account possible alternative sources of supply or demand.[32] In this context, in the view of the OGH the key factor is whether other options are available to the respective business partner under economically justifiable conditions.[33] So far, the Austrian courts have established relative market dominance in the case of a (vertically integrated) film distributor in relation to its customers (i.e., independent film theatres)[34] as well as in the very recent case concerning car manufacturer Peugeot against independent car dealers.[35] By moving the concept of relative market power to a new separate section in the course of the KaWeRÄG 2021 (namely, Section 4a of the KartG) and extending its scope to cover trade in services in addition to goods and the new establishment of a business relationship, the Austrian legislator aims to increase the application of this sometimes-neglected concept.

Prohibition on granting dissimilar trading conditions for non-dominant companies

As outlined above, the cartel courts are also competent to enforce the Fair Competition Act, which is not limited to companies holding a dominant market position. In particular, Section 2 of the Fair Competition Act allows an injunction against a supplier on the wholesale level (or a dealer on the retail level) requesting or granting dissimilar conditions to retailers (or wholesalers, respectively) without an objective justification. Claimants sometimes try to use the provisions of the Fair Competition Act in the event that they have difficulties establishing the dominant market position of a defendant. However, in practice, the Fair Competition Act currently plays a rather limited role in Austrian decision-making practice.

Note that while the (full) title of the Fair Competition Act (i.e., Improvement of Local Supply and Competitive Conditions) might suggest that it only applies to sectors relevant for local (food) supply (e.g., food retailers, supermarkets), the OGH has also applied its provisions to other economic sectors, such as round timber[36] and running shoes.[37]

The amendment to the Fair Competition Act (formerly: Local Supply and Improvement of Competition Conditions) entered into force on 1 January 2022, thereby transposing into Austrian law the Unfair Trading Practices Directive.[38]

Abuse

i Overview

Section 5, Paragraph 1 of the KartG contains a general prohibition on abusing a dominant market position, and further sets out a non-exhaustive list of specific types of abusive conduct (Section 5, Paragraph 1, Nos. 1 to 5 of the KartG). In general, the concept of abuse of a dominant market position under Section 5 of the KartG largely corresponds to the provision in Article 102 of the TFEU. Therefore, the case law of the European Commission as well as the EU courts in the field of dominance is also relevant to domestic Austrian cases.

ii Exclusionary abuses

Section 5 of the KartG prohibits exclusionary conduct ranging from predatory pricing to margin squeeze, loyalty rebates and (long-term) exclusivity clauses in vertical agreements, as well as tying and bundling, price tying and refusal to deal or supply.

With regard to predatory pricing, the OGH followed the European Court of Justice (ECJ) rulings in *Akzo*,[39] *Tetra Pak II* [40] and *Post Danmark*,[41] according to which prices below the average variable costs are considered an indication of exclusionary conduct. It further held that in cases where prices are set above the average variable costs, but still below the overall costs, they are only considered abusive if it can be demonstrated that they are used to exclude competitors.[42]

By reference to the *Post Danmark* judgment, the OGH confirmed the long run incremental cost method used in a case by a court-appointed expert to establish the existence of predatory pricing.[43]

Further, Section 5, Paragraph 1, No. 5 of the KartG (as Article 102 of the TFEU) specifically stipulates the abusive character of selling goods below cost. Based on the case law of the Austrian cartel courts, this provision only applies to the selling of goods below cost for a certain period and not to the selling of services.[44] Moreover, Section 5, Paragraph 2 of the KartG stipulates that the dominant company may rebut an appearance of sales below cost or provide an objective justification (e.g., because the expiry date of the products is approaching).

To date, the OGH has not had to issue a material decision on a margin squeeze case. However, the OLG held in an *obiter dictum* in 2002 that a company with a dominant position is not obliged to set its prices at a level to guarantee its competitors commercial success. According to the OLG, this is also true for cases where competitors purchase an intermediate product from the dominant company.[45] Once a question of material law related to margin squeeze conduct has reached the OGH, it will be seen whether it will uphold this rather sceptical approach by the OLG or will follow the ECJ's case law.[46]

With regard to rebates, the OGH follows the ECJ's distinction between generally admissible quantity rebates and generally inadmissible target and loyalty rebates.[47] However, case law on exclusionary conduct stemming from inadmissible rebates is rather limited in Austria.

The OGH has dealt with a number of cases relating to the obligation to contract by dominant companies.[48] For example, the OGH affirmed the obligation of the Austrian Federal Railways to allow its only private competitor, Westbahn, to participate in the Austrian Federal Railways electronic timetable information system.[49]

iii Discrimination

Section 5, Paragraph 1, No. 3 of the KartG prohibits discrimination of contract partners by the application of dissimilar conditions to equivalent transactions, thereby placing them at a competitive disadvantage. A similar prohibition of discrimination for wholesalers and retailers (even if not in a dominant position) is contained in Section 2, Paragraph 1 of the Fair Competition Act (see above; a violation against this prohibition allows the contracting party to claim for injunctive relieve but does not lead to any fines). Under both provisions, the most common discriminatory behaviour is discriminatory pricing.

A transaction is considered to be equivalent and requires equal treatment where the various contract partners are in the same position towards the supplier.[50] With regard to possible objective justifications, the OGH takes the view that, inter alia, different delivery terms, transportation costs or statutory frameworks in different countries can provide objective justifications for applying different conditions to equivalent transactions.[51]

iv Exploitative abuses

The main statutory provision prohibiting exploitative abuses, including (but not limited to) excessive pricing, is Section 5, Paragraph 1, No. 1 of the KartG. This provision was amended with the Cartel Amendment Act 2012, and changed from a wording that corresponded to Article 102, Letter a of the TFEU to an almost identical wording as Section 19, Paragraph 2, No. 2 of the German Act against Restraints of Competition. However, the case law relating to the former Section 5, Paragraph 1, No. 1 of the KartG may still be used for interpretation purposes.[52]

So far, there has been only one case before the OGH based on this amended provision. Therein, the OGH, by referring to German case law,[53] held that requesting excessive prices or other exploitative conditions from a contract partner is not limited to contract negotiations, but is also applicable to an ongoing contractual relationship when refusing to lower prices or allow changes to the contract.[54] Moreover, it stipulated that only a significant price excess compared to the price that would have to be paid in a competitive environment falls under Section 5, Paragraph 1, No. 1 of the KartG.

Remedies and sanctions

i Sanctions

The legal nature of fines imposed for antitrust violations under Austrian law is not clear. Austrian antitrust fines share some of the characteristics of criminal sanctions as well as of the sanctions under administrative criminal law, but are imposed by the cartel courts as civil courts, and not by the criminal courts or an administrative authority. The OGH considers them to have a hybrid nature having some similarities with criminal sanctions.[55]

According to Section 29 of the KartG, a fine requires an intentional or negligent violation of the antitrust law. Thus, when imposing a fine upon a company for abusing a dominant position, it is necessary to identify one or more individuals who have committed the infringement intently or negligently, and whose acts or omissions can be attributed to the company.[56] However, similar to that found under EU competition law, the standard for proving an intentional or negligent infringement is not very high. In an abuse of dominance case, the FCA can request a cartel court to impose a fine of up to 10 per cent of the overall group turnover of the last business year.

Section 30, Paragraph 1 of the KartG stipulates that the amount of a fine shall be based on the gravity and duration of the infringement, the illicit gain from the infringement, the degree of liability and the economic strength of the perpetrator. Since 1 March 2013, Section 30, Paragraphs 2 and 3 of the KartG have set out aggravating (e.g., repeat offender) and mitigating (e.g., own termination of infringement, cooperation, damage payments) factors.

Fines are imposed on the undertaking normally being the company that committed the abuse. However, as under EU law, fines may also be imposed on a parent company in cases where a subsidiary did not act autonomously in the market but followed the instructions of the parent company (single economic entity doctrine).[57] In a vertical price-fixing case, the OGH has already used the EU law concept of parental liability to fine the company committing an infringement as well as its four direct and indirect controlling shareholders.[58] Thus, it can be assumed that the Austrian cartel courts will follow the single economic entity doctrine for calculating fines and attributing liability also in cases of fines for abuse of a dominant market position.

ii Behavioural remedies

Section 26, Sentences 1 and 2 of the KartG allows the OLG to issue (proportionate) restraining orders to end an abusive behaviour. These orders require a prior request by the Official Parties or by an interested company to the cartel proceedings. Often such requests to end an abusive behaviour are combined with a request for an interim injunction according to Section 48, Paragraph 1 of the KartG.

As an alternative to ordering a company to cease an infringement, the OLG may issue binding commitments if it can be expected that these preclude an abusive behaviour in the future (Section 27, Paragraph 1 of the KartG). In contrast to commitment decisions of the European Commission, such decisions can only be passed on the basis of the (tacit) assumption that there was an infringement. In cases of commitments, the OLG has to reopen a case if the facts have changed significantly, the company in question does not comply with its commitment, or the decision was based on incomplete, incorrect or misleading information.

iii Structural remedies

In a proceeding requesting the ending of an abuse of dominance, the OLG may also order structural remedies (i.e., a change in the company structure). However, such structural measures may only be imposed if no other effective remedies are available, or if these alternatively effective remedies would result in a greater burden for the company (Section 26, Sentence 3 of the

KartG). The OGH explicitly held that such structural remedies may only be imposed in particularly severe cases of an abuse of dominance and are in any case subsidiary compared to all other available measures.[59]

Procedure

Abuse of dominance cases are either investigated by the FCA (*ex officio* or on the basis of complaints) or are commenced directly by parties claiming harm from an alleged abusive behaviour initiating proceedings in front of the cartel court.

i Commencement of proceedings

Proceedings may be commenced by the Official Parties, in particular based on market investigations or more often on third-party complaints (i.e., consumer associations, competitors, customers or suppliers). The FCA may send formal or informal information requests and questionnaires to the investigated undertaking and to third parties, or (subject to a court order) may also conduct surprise inspections or dawn raids to gain further evidence in connection with an alleged abusive conduct to copy or seize documents and electronic files.

Alternatively, parties claiming harm from an alleged abusive behaviour can directly commence proceedings in the cartel court (requesting that a certain behaviour is stopped or that it is determined that past behaviour was an abuse of dominance). In addition, in some cases parties may also claim that a certain behaviour was an illegal abuse of a dominant market position in a civil law proceeding before the ordinary courts. In particular, a violation of Section 5 of the KartG can also constitute a breach of law within the meaning of Section 1 of the Austrian Federal Act Against Unfair Competition, which can be used as a basis for an action before the ordinary courts.

ii Right to be heard

During the proceedings of the cartel court, based on the fundamental right to a fair trial, every party has the right to be heard during all stages of the proceedings, and is entitled to be represented by an attorney-at-law at all times.

In the event that the FCA plans to initiate proceedings before the cartel court following an investigation, it has to inform the (prospective) defendant about the results of its investigation and give the defendant the possibility to comment on them.[60] In the event that the FCA's investigation does not give a reason for the commencement of proceedings before the cartel court, the defendant also has to be informed within a reasonable period.[61]

iii Settlements

Informal settlements between the FCA and the (alleged) perpetrator before the commencement of proceedings before the cartel court make up the majority of antitrust fine cases in Austria. The FCA published a guidance paper on settlements in 2014.[62] After the decision in a vertical price-fixing case in the retail sector that did not involve a settlement,[63] where the OGH multiplied the fine initially imposed by the OLG by 10, the incentive for companies to settle fine cases has increased even further (at least in cases where it is likely that an infringement ultimately can be proved by the Official Parties).

In dominance cases, those types of settlements are not yet that common. At the same time, in the case of proceedings initiated by private claimants, sometimes the parties agree on a settlement in the cartel court proceedings or out of court (by means of a settlement agreement).

iv Appeal proceedings

Decisions of the OLG may be appealed with the OGH. The OGH may only review decisions on questions of law, and therefore typically cannot review decisions as regards questions of fact. Thus, the review is rather limited, and in particular does not encompass the consideration and assessment of the evidence made by the OLG.

Private enforcement

Private antitrust litigation in Austria has substantially increased in recent years. To a large extent, such growth can be attributed to an increase of cartel court decisions imposing fines against cartel members based on intensified enforcement activity of the Official Parties. The OGH, in several cases, has affirmed the possibility of claims for damages for directly damaged parties[64] as well as for indirectly damaged parties,[65] including cases where damage was allegedly caused by cartel outsiders (umbrella pricing).[66]

i Private right of action

With the Austrian Cartel and Competition Law Amendment Act 2017 implementing the EU Damages Directive,[67] the Austrian private enforcement regime changed significantly. The provisions on the compensation of harm caused by infringements of the antitrust law (Section 37a to 37m of the KartG) entered into force retroactively as of 27 December 2016 (apart from the provision in Section 37m concerning the imposition of fines). Thus, the substantive provisions apply to harm incurred after 26 December 2016; for all damage arising before this date, the old regime has to be applied.

ii Collective actions

Austrian law does not provide for class actions as found in Anglo-American legal systems (neither on an opt-in nor an opt-out basis). Recently, Austrian-style 'class actions' have been brought before courts mainly by the Association for Consumer Protection (VKI) through individual consumers assigning their claims to the VKI, which then tries to combine these claims in a single court proceeding.[68] However, courts have differed in their treatment by either treating them as separate single proceedings, by joinder of claimants, or by having one 'test proceeding' (while staying the other proceedings) that then serves a similar function to a 'precedent' for the other claims.[69]

iii Calculating damages

Under Austrian law, antitrust damages are limited to the actual loss suffered, which also includes lost profits plus statutory default interest[70] calculated from the date the harm occurred. Thus, Austrian law does not allow claims for punitive or treble damages and does not take into account possible fines imposed by competition authorities.

According to Austrian case law, antitrust damages are calculated by comparing the actual financial situation of the injured party after the infringement with the counterfactual hypothetical scenario without the damaging infringement.[71]

Further, Austrian law allows the courts to estimate the quantum of the damages if the liability has already been established and the injured party was able to establish that it has suffered damage owing to an antitrust infringement (i.e., the injured party has to prove the 'first euro' of its damages).[72]

iv Interplay between government investigations and private litigation

Section 37i, Paragraph 2 of the KartG stipulates that decisions of the cartel court, the European Commission or the national competition authorities of other EU Member States establishing an infringement have a binding effect for the Austrian civil courts as regards illegality and culpability. Therefore, in a follow-on scenario, claimants 'only' have to establish the damage incurred and a causal link between the infringement and such damage.

Future developments

While it remains to be seen what impact the amendments following the KaWeRÄG 2021 will have, it is to be expected that digital markets will be even more closely monitored under the Austrian dominance regime in the future. As outlined above, the main changes of the KaWeRÄG 2021 include an exemplary list of factors addressing typical market power criteria of the platform economy (including the importance of intermediary services of the allegedly dominant undertaking for the market access of other businesses, the access to data that is relevant for competition and the benefit derived from network effects) as well as a separate procedure to determine the dominant position of an undertaking operating on a multilateral digital market if there is a legitimate interest in doing so (see above). Overall, also considering the recent investigations against Amazon and the (digital) cooperation with the regulator RTR, there is a clear trend towards enforcement against abuse of dominance behaviour in the digital sector, in particular concerning digital platforms.

However, based on the limited activity of the FCA in dominance cases in the past, we do not consider it very likely that the FCA will suddenly change its approach towards being considerably more active in this area in the near future. Rather, we would expect that the public enforcement focus will remain on agreements and concerted practices restricting competition (in particular, vertical agreements) and merger control. Therefore, enforcement activity in the field of dominance will, to a large extent, depend on private parties pursuing their claims directly (on a stand-alone basis and not as a follow-on action).

Footnotes

[1] Bernt Elsner and Dieter Zandler are partners and Vanessa Horaceck is an associate at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.

[2] A German version of the notice is available at **www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20zum%20Bestattungswesen.pdf** (last accessed 4 April 2022).

[3] A German version of the notice is available at **www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20KFZ-Vertrieb.pdf** (last accessed 4 April 2022).

[4] A German version of the notice is available at **www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20-%20Medienkooperationen%20zwischen%20Konzertveranstaltern%20und%20H%C3%B6rfunk.pdf** (last accessed 4 April 2022).

[5] An English version of the notice is available at **www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB-Guidance_Fairness_in_business.pdf** (last accessed 4 April 2022).

[6] European *Court of Justice (*ECJ) 23 April 1991, Case C-41/90, *Höfner and Elser*; 12 July 2012, Case C-138/11, Compass-Datenbank *v. Republic of Austria*; OGH 8 October 2015, 16 Ok 3/15z.

[7] An English version of the joint announcement is available on the FCA website at **https://www.bwb.gv.at/en/news/news_2019/detail/rtr-telecommunications-and-postal-services-and-bwb-stepping-up-digital-cooperation-development-of-a** (last accessed 4 April 2022).

[8] An English version of the method paper is available on the RTR website at **www.rtr.at/TKP/aktuelles/publikationen/publikationen/plattformen-monitoring-methoden.en.html** (last accessed 4 April 2022).

[9] A German version of the report is available on the RTR website at **www.rtr.at/TKP/aktuelles/publikationen/publikationen/Monitoring_Interpersonelle_Kommunikationsdienste_mit.en.html** (last accessed 4 April 2022). A German version of the press release of the FCA following the publication of the report is available on the FCA website at **https://www.bwb.gv.at/news/news-2020/detail/rtr-praesentiert-im-rahmen-des-digitalen-monitorings-studie-zu-instant-messaging-in-enger-zusammenarbeit-mit-der-bwb** (last accessed 4 April 2022).

[10] A German version of the press release of 22 February 2022 is available on the website of the FCA at **https://www.bwb.gv.at/news/news-2022/detail/mobilfunk-und-wettbewerb-bwb-unterstuetzt-die-geplante-analyse-des-mobilfunkmarktes-durch-die-regulierungsbehoerde-tkk** (last accessed 6 April 2022).

[11] A German version of the press release of 25 March 2021 is available on the website of the FCA at **https://www.bwb.gv.at/news/detail/roundtable-mobilfunkmarkt-bwb-und-rtr-schaerfen-wettbewerbsverstaendnis-im-sektor** (last accessed 6 April 2022).

[12] A German version of the judicial committee's report is available at **www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02035/fname_277230.pdf**, p. 3 (last accessed 4 April 2022).

[13] Federal Law amending the Cartel Act 2005 and the Competition Act, BGBl. I No. 176/2021.

[14] OGH 27 June 2013, 16 Ok 7/12.

[15] OGH 1 December 2015, 16 Ok 4/15x.

[16] OGH, 12 October 2021, 16 Ok 1/21i.

[17] OGH 17 February 2021, 16 Ok 4/20d.

[18] OLG, 11 March 2021, 26 Kt 3/20s. An English version of the FCA's 6 April 2021 press release is available on the FCA website, **https://www.bwb.gv.at/en/news/detail/merck-sharp-dohme-gmbh-and-afca-reach-agreement-before-the-cartel-court-on-commitments-to-end-proc** (last accessed 4 April 2022).

[19] OGH 25 January 2021, 16 Ok 3/20g.

[20] OLG 25 February 2020, 24 Kt 1/19f.

[21] An English version of the announcement of investigations of 14 February 2019 is available on the FCA website at **https://www.bwb.gv.at/en/news/news_2019/detail/austrian-federal-competition-authority-initiates-investigation-proceedings-against-amazon** (last accessed 4 April 2022).

[22] An English version of the press release dated 17 July 2019 is available on the FCA website at **https://www.bwb.gv.at/en/news/news_2019/detail/bwb-informs-amazon-modifies-its-terms-and-conditions-1** (last accessed 4 April 2022).

[23] An English version of the case summary of the FCA of 17 July 2019 is available at **www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf** (last accessed 4 April 2022).

[24] OGH 25 March 2009, 16 Ok 4/08; 12 December 2011, 16 Ok 8/10.

[25] See, for example, OGH 2 December 2013, 16 Ok 6/12.

[26] Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 19.

[27] OGH 25 March 2009, 16 Ok 4/08.

[28] Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 8.

[29] However, indirect participations of at least 25 per cent will normally only be considered if there is also a controlling influence at the preceding level (see OGH 17 December 2001, 16 Ok 9/01).

[30] OGH 11 October 2004, 16 Ok 11/04.

[31] OGH 22 June 1999, 4 Ob 90/99k.

[32] OGH 1 July 2002, 16 Ok 5/02.

[33] OGH 17 February 2021, 16 O k4/20d.

[34] OGH 1 July 2002, 16 Ok 5/02; 16 July 2008, 16 Ok 6/08.

[35] OGH 17 February 2021, 16 O k4/20d.

[36] OGH 16 July 2008, 16 Ok 3/08; 25 March 2009, 16 Ok 2/09 (16 Ok 3/09); 9 June 2010, 16 Ok 1/10.

[37] OGH 26 June 2014, 16 Ok 12/13.

[38] Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ 2019 L 111, pp. 59–72.

[39] ECJ 3 July 1991, Case C-62/86, Akzo.

[40] ECJ 14 November 1996, Case C-333/94P, *Tetra Pak v.* Commission.

[41] ECJ 27 March 2012, Case C-209/10, *Post* Danmark.

[42] OGH 9 October 2000, 16 Ok 6/00.

[43] OGH 8 October 2015, 16 Ok 9/15g.

[44] OGH 16 December 2002, 16 Ok 10/02.

[45] OLG 14 May 2002, 29 Kt 554, 555/00.

[46]ECJ 14 October 2010, Case C-280/08P, *Deutsche Telekom v. Commission*; 17 February 2011, Case C-52/09, TeliaSonera.

47 OGH 22 June 1999, 4 OB 90/99k; 11 October 2004, 16 Ok 9/04.

48 OGH 20 December 2005, 16 Ok 23/04; 4 April 2004, 16 Ok 20/04; 16 July 2008, 16 Ok 6/08.

49 OGH 11 October 2012, 16 Ok 1/12.

50 OGH 10 March 2003, 16 Ok 1/03.

51 OGH 9 June 2010, 16 Ok 1/10.

52 OGH 12 September 2007, 16 Ok 4/07.

53 BGH KVR 13/83, WuW/E BGH 2103.

54 OGH 16 September 2014, 16 Ok 13/13.

55 OGH 26 June 2006, 16 Ok 3/06; 12 September, 16 Ok 4/07.

56 OGH 5 December 2011, 16 Ok 2/11.

57 ECJ 10 September 2009, Case C-97/08P, *Akzo Nobel ao v.* Commission.

58 OGH 8 October 2015, 16 Ok 2/15b (16 Ok 8/15k).

59 OGH 19 January 2009, 16 Ok 13/08.

60 Section 13, Paragraph 1 of the Act on the foundation of the Federal Competition Authority (Wettbewerbsgesetz).

61 Section 13, Paragraph 2, Wettbewerbsgesetz.

62 An English version of the notice is available at **www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Settlements_english.pdf** (last accessed 4 April 2022).

63 OGH 8 October 2015, 16 Ok 2/15b, 8/15k.

64 OGH 26 May 2014, 8 Ob 81/13i.

65 OGH 2 August 2012, 4 Ob 46/12m.

66 OGH 29 October 2014, 7 Ob 121/14s.

67 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349, p. 1.

68 Kodek, 'Haftung bei Kartellverstößen in WiR – Studiengesellschaft für Wirtschaft und Recht' (eds), *Haftung im Wirtschaftsrecht* (2013), pp. 63 and 77.

69 Kodek in Neumayr, *Beschleunigung von Zivil- und Strafverfahren*, 2014, p. 9.

70 The applicable statutory default interest is 4 per cent (Section 1000, Paragraph 1 General Civil Code), except for claims from contractual relationships between businesses, which is 9.2 per cent +/- base interest (Section 456 Austrian Business Code).

71 OGH 15 May 2012, 3 Ob 1/12m.

[72] In one case, the allegedly injured party was not able to establish that it had suffered damage in follow-on litigation from the *Escalator* cartel as the claimant (owing to lack of contractual documentation) was only able to make estimates of the prices paid to the cartel members rather than the actual prices paid (see OGH 15 May 2012, 3 Ob 1/12m).

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